IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 881 of 2003

IN

SUIT NO. 1148 of 2001

The Board of Trustees of the
Port of Bombay .. Plaintiffs

versus

M/s.Atus Soap Pvt. Ltd & ors. .. Defendants

...

Mr.K.G. Gandhi i/b Mulla & Mulla for the plaintiff.
Mr.Parag Kale for the defendant no.5.
Mr.Akshay Kolse Patil i/b A. Mehta Laljee for the defendant no.2.

CORAM : D.G. KARNIK,J.
DATED : 10th March 2005.

P.C.:

1. Heard the learned counsel for the parties.

2. This motion is taken out by the defendant no.5 for an order of a dismissal of the suit under Order

11 Rule 21 of the Code of Civil Procedure for non compliance of an order of inspection passed by this Court on 21st January 2003 in Chamber Summons no. 1221 of 2002.

3. The defendant no.5 had taken out the Chamber Summons no.1221 of 2002 in the suit for an order of inspection and supply of the copies of the documents specified therein. At the hearing of the said Chamber Summons, the learned counsel for the plaintiff stated that the plaintiff had no objection to give inspection. In view of this, the said Chamber Summons was allowed by the Court with the following order:

> "Heard both sides. This Chamber Summons is taken out on behalf of defendant no.5 for seeking inspection and supply of documents specified in the application. Learned counsel for the plaintiff has no objection to give inspection provided certain time is granted. Chamber Summons is made absolute in terms of prayer clause (a) and (b). Inspection of the documents shall be given within 4 weeks from the date of this order. Chamber Summons disposed of accordingly.

4. The Officers of the defendant no.5 thereafter went to the office of the solicitors of

the plaintiff on 7th February 2003 and on 14th February 2003, for inspection. Though inspection of some documents were given, inspection of two of the documents mentioned in prayer clause a(ii) and a(iii) i.e. bill of lading and invoice and packaging list of the consignment was not given. The defendant recorded this fact by writing a letter dated 15th February 2003. The letter was received by the plaintiff of solicitors and a copy of the said letter along with the acknowledgement of the plaintiff's solicitors is annexed as Exhibit-3 to the affidavit in support of the present motion.

5. The plaintiff has not filed any affidavit in reply. Thus, the averments made in the affidavit in support to the motion are deemed to be admitted. In the motion, the plaintiff has specifically averred that the order passed by this Court on 21st January 2003 in Chamber Summons No. 1221 of 2002 has not been complied in as much as the inspection of the two documents was not given. The fact was also recorded by the defendant in its letter dated 15th February 2003. These averments are not denied by the plaintiff. It has therefore

to be held that the plaintiff has not complied with the order of this Court directing it to give the inspection.

6. Order 11 Rule 21 of the Code of Civil Procedure reads as under:-

> **Non-compliance with order for discovery** - (1) Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and
>
> (2) Where an order is made under sub-rule(1) dismissing any suit, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action.

Rule 21 of Order 11 states that the suit of the plaintiff would be liable to be dismissed for want of prosecution if the order directing inspection is not complied with. Assuming that Order 11 Rule 21 is directory, the order of dismissal of a suit would not be passed if the inspection is given but after the time fixed by the Court. However till

today, the inspection has not been given.

7. The learned counsel for the defendant orally states that the plaintiff could not give inspection of the said documents because the documents are not in possession of the plaintiff. This fact however is not stated on affidavit. Furthermore, before the learned Chamber Judge, the plaintiff unconditionally made an offer to give inspection of the documents mentioned in the Chamber Summons. At that time, it was not stated that the documents mentioned at Sr. No. a(ii) and a(iii) were not in its possession. Assuming that at the time when the said statement was made before the learned Chamber Judge, the plaintiff was not aware that the said documents were not in its possession, even after the defendant no.5 wrote a letter dated 15th February 2003 pointing out that the inspection cannot be given and praying for modification of the order passed by this Court on 21st January 2003 in the Chamber Summons no.1221 of 2002. Even now, no affidavit has been filed by the plaintiff stating that the documents are not in its possession.

8. In the circumstances, the oral statement made by the learned counsel for the plaintiff that the documents are not in its possession and therefore, inspection could not be given cannot be accepted. Since there is a breach of the order passed by this Court and there is not even an offer to rectify the said breach even now, I have no alternative but to dismiss the suit for non prosecution against defendant no.5.

8. Accordingly, motion is made absolute in terms of prayer clause (a).

D.G. KARNIK, J